SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-484

THE INDEPENDENT SOAP & CHEMICAL WORKERS OF KANSAS CITY, KANSAS,
Petitioner,

vs.

FLORENCE N. CUNNINGHAM, ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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OPINION OF THE COURT BELOW

(Filed July 16, 1971)

The opinion of the court was delivered by

SCHROEDER, J.: This is an equitable action in which members of a labor organization sought to have the district court determine that the defendant labor organization was not authorized to expel them from membership and to issue an injunction against the defendant

union. The lower court found the union was without power to discipline its members by expulsion and granted the injunctive relief requested, whereupon the union has duly perfected an appeal.

The facts in the case are not in dispute. The parties have entered into an extended stipulation setting forth the facts governing the case and the necessary exhibits material to the facts.

The Independent Soap & Chemical Workers of Kansas City, Kansas, hereinafter referred to as the union, is an unincorporated association and a labor organization within the meaning of the Labor Management Relations Act, 1947, as amended. (29 U.S.C.A. §152 [5].) It is not affiliated with any national or international union. It is recognized as the exclusive collective bargaining representative of a bargaining unit composed of certain employees (including the plaintiffs) of Procter & Gamble Manufacturing Company at its plant located in Kansas City, Kansas, which is engaged in an industry affecting commerce as defined in the Labor-Management Reporting and Disclosure Act of 1959. (29 U.S.C.A. §402 [j].) At all times material hereto the union had approximately 500 members.

The union has had contracts with the company since 1937. In 1964 the parties entered into a contract which provided for reopening the contract by sixty days' notice prior to December 29, 1967. Such notice was given by the union to the company and subsequent thereto a notice to terminate the agreement was given by the union. From December 29, 1967, up to August 2, 1970, the union and the company were unable to arrive at a new agreement.

On or about July 9, 1970, certain employees of Procter & Gamble who were members of the union concertedly

refused to work in protest of certain disciplinary action taken by the company, which was the subject of grievances filed by the union. On the morning of July 10, 1970, these employees congregated about the gates of the plant with picket signs and on strike signs. This picket line was not authorized at this time by the union. A majority of the employees reporting for the first shift of work on July 10, 1970, refused to cross this picket line.

On July 10 and 11, 1970, the union scheduled a membership meeting for Sunday, July 12, 1970, and publicized the meeting by announcements made by radio and television media.

Also, on July 10, 1970, Procter & Gamble instituted an action in the Wyandotte district court to enjoin the union from engaging in mass picketing and violence about the entrances of the plant. A temporary injunction was issued to this effect by the court, but the injunction did not enjoin the strike itself.

On July 12, 1970, a union meeting was held among the members to discuss the strike action and picketing engaged in by certain of its members. At this meeting those members of the union present voted "to strike until the disciplinary action was resolved and the contract negotiations were completed." Approximately 375 members of the union were present and voted on the question.

Florence N. Cunningham, the named plaintiff, and other members in the class described in the petition, were members of the union, some having been members of the union for as long as 20 or 25 years. Some of the employees who voted to expel the plaintiffs were members of the union for 33 years. Each of the class who heard the radio or television announcements of the July 12th meeting had an opportunity to participate in the discussion and vote at this meeting. Subsequently, each member of the

class knew the union had voted to strike and concertedly refused to render services. Each knew that the union had directed all members not to work.

Between July 12, 1970, and August 2, 1970, the union was on strike. The union placed pickets at employee entrances to the plant. On August 2, 1970, the union membership called to a meeting pursuant to written mail notices, voted to terminate the strike and the strike was terminated. At this time the terms of a new contract which had tentatively been agreed upon by Procter & Gamble and the union were ratified by the membership.

Section III of the contract pertaining to union membership and collection of dues reads in part:

> "1. Any employee who is, or becomes, a member of the Union by signing an authorization card may at his own discretion remain a member in good standing during the life of this Agreement. In case of illness or disability *or leave of absence due to lack of work* dues will be waived until the employee returns to work."

Neither the new contract nor the prior contract entered into in 1964 contained any provision for union security; that is, no employee was required as a condition of employment to become a member of the union.

Between July 12 and August 2, 1970, and while pickets were placed at the entrances to the plant, and the strike was in progress, at various times and on various dates after July 12, 1970, Cunningham and other members of the class returned to work and performed work for Procter & Gamble.

On August 2, 1970, the membership of the union, at a special meeting called by mail notices, voted to direct the bargaining committee to institute proceedings against the members of the class, plaintiffs herein.

On or about August 4, 1970, the union by its bargaining committee notified by certified mail Cunningham and other members of the class that each had been charged with going back to work and crossing the picket line. The notice directed them to appear before the representative body on August 15th.

On August 15, 1970, the representative body met to review the charges made by the bargaining committee. There are approximately 30 members on the representative body, the plaintiff Cunningham and four other members of the class were also elected members of the representative body. Cunningham appeared in person and with counsel and other members of the class appeared by counsel only. However, counsel for Cunningham and all members of the class were denied the right to appear at the hearing.

Counsel for Cunningham and other members of the class left statements with union representatives (which they refused to accept) indicating their representation of the plaintiffs and challenged the jurisdiction of the union to conduct a hearing or to impose disciplinary action.

The representative body recommended that Cunningham and the other members of the class be expelled from the union and such action was taken. Statements made by other members at the August 15, 1970, meeting of the representative body indicated and disclosed that Cunningham and all except two members of the class had in fact crossed the union's picket line and gone back to work while the strike was in progress.

The union maintains no retirement, death benefit, funeral benefit or similar benefit of its own, and thus the members of the class do not have any monetary rights to any funds if such eventualities should occur in the future.

The constitution and bylaws of the union which are a part of the record contain no procedure for appeal of the union action; thus all internal remedies have been exhausted. This action was brought by Cunningham and others in the class in the district court of Wyandotte County where their requested relief was granted. The court held the union was not empowered, able or authorized to expel the plaintiff and other members of the class under its constitution and bylaws, and it permanently enjoined the union from interfering with, or infringing upon, the membership right of the plaintiff and other members of the class.

The union's constitution and bylaws are unique in that they do not spell out in any manner how or when one becomes a member, nor how or when a member can be expelled, except that a person who fails to pay dues for three consecutive months is deemed to be automatically expelled. The union has no initiation fee and the bylaws do not require that a person who deems himself to be a member take any oath or obligation.

The appellant contends the union exists solely for purposes of representing employees who engage in collective concerted activity for their mutual aid and protection. The union's position is that Cunningham and other members in her class are strikebreakers who sought to destroy the union in its effort to perform the only function for which it was created. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 18 L.Ed.2d 1123, 87 S.Ct. 2001, is cited for the proposition that strikebreaking is the most serious offense a member of the union can engage in " 'for it undercuts the union's principal weapon and defeats the economic objective for which the union exists.' " (pp. 181, 182, footnote 8.)

The *Allis-Chalmers* case, however, does not support the appellant on the point here presented. There the

union's constitution and bylaws authorized fines and expulsion of recalcitrants, including strikebreakers. The issue there before the United States Supreme Court was whether disciplinary action by a union against strikebreakers pursuant to its constitution and bylaws was an unfair labor practice under Section 8 (b) (1) (A) of the National Labor Relations Act of engaging in conduct "to restrain or coerce" employees in the exercise of their right guaranteed by Section 7 to "refrain from" concerted activities.

Section 7 of the Labor Management Relations Act, 1947, as amended, provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title. (29 U.S.C.A. §157.)

Section 8 of the National Labor Relations Act provides in part:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C.A. §158 [b] [1] [A].) (Emphasis added.)

The appellees contend the issue in this case is a simple one of contract interpretation—*i.e.*, whether the union's constitution and bylaws give it the power to discipline them by expulsion.

The trial court in its memorandum opinion on November 10, 1970, found as follows:

> "(1) There is no rule in the defendant's constitution, and bylaws regarding the procedure, the grounds, or the right of the union to terminate membership other than a provision (not here involved) that membership is automatically terminated if dues become more than three months in arrears;
>
> "(2) The union may not punish its members for violations of implied obligations and this Court does not recognize so-called 'implied offenses' and thereby rewrite the union's constitution and bylaws;
>
> "(3) The union, in its relations with its members, is governed by its constitution and bylaws and the rights and duties of the members as between themselves and in their relationship with the union in all matters affecting internal government and the management of its affairs must be determined by the terms of such constitution and bylaws;
>
> "(4) In the absence of reasonable rules and regulations in the defendant's constitution and bylaws, defendant has no authority or power to discipline its members by expulsion;"

It is almost universally accepted that the relationship between a union and its members is a contractual one. As the source of the union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we must turn in evaluating the union's conduct. (See *International Association of Machinists and Aerospace Workers, Local Lodge No. 504 (Arrow Development Co.) and David O'Reilly,* 1970 CCH NLRB [¶22,260] 185 NLRB 22.)

The foregoing statement of the law clearly reflects the congressional intent expressed in the Labor-Management Reporting and Disclosure Act of 1959 which says the equal rights of members of a labor organization should only be "subject to reasonable rules and regulations in such organization's constitution and bylaws." (29 U.S.C.A. §411 [a] [1].)

Since this is a matter of contract law it is essentially a question of state law. To this proposition both parties accede. The Labor-Management Reporting and Disclosure Act of 1959 omits any attempt to preempt state law in this area but instead says that state remedies continue to prevail. (29 U.S.C.A. §413.)

While there is no Kansas case directly in point, this court has adopted the theory that the relationship of voluntary associations with its members is governed by contract law. It makes no difference whether the articles of agreement of the association are called a constitution, charter, bylaws or any other name. In 1950 this court in *Radio Station KFH Co.* v. *Musicians Ass'n, Local No. 297,* 169 Kan. 596, 220 P.2d 199, discussed the contract relationship at some length as follows:

> "Voluntary associations have the right to make their own regulations as to admission or expulsion of members, and one who becomes a member assents, by his membership, to the constitution and rules of procedure adopted by such an association. The constitution, rules and bylaws, knowingly assented to, become in effect a civil contract between the parties whereby *their rights are fixed and measured. . . .*" (p. 602) (Emphasis added.)

The court went on to discuss specifically the relationship between the association and its individual members regarding its internal affairs:

> ". . . The constitution, rules and bylaws of a voluntary, unincorporated association constitute a 'contract' between the association and its members and the rights and duties of the members as between themselves and in their relation to the association in all matters affecting its internal government and the management of its affairs are measured by the terms of such constitution and bylaws. . . ." (p. 602.)

Another case in accord is *Porth* v. *Local Union 201,* 171 Kan. 177, 231 P.2d 252.

Thus, the contract manifest in the constitution and bylaws governs this matter.

Other states which have adopted the contract theory have essentially disposed of the question here presented in favor of the appellees. In *Sweetman* v. *Barrows,* 263 Mass. 349, 161 N.E. 272, 62 A.L.R. 311, the court found the plaintiff had been wrongfully expelled because of the absence of enabling provisions in the bylaws. The court held the member of the union "was entitled to fair treatment and could not be expelled and deprived of his membership except as authorized by the by-laws of the association." (p. 355.)

In a similar decision, *Smetherham* v. *Laundry Workers' Union,* 44 C.A.2d 131, 111 P.2d 948, the California court directed reinstatement of membership and awarded damages to an employee who was improperly expelled from the union, stating:

> ". . . It is true that courts will not interfere with the disciplining or expelling of members of such associations where the action is taken in good faith and in accordance with its adopted laws and rules. But if the decision of the tribunal is contrary to its laws or rules, or it is not authorized by the by-laws of the association, a court may review the ruling of the board and direct the reinstatement of the member. . . ." (pp. 135, 136.)

Other cases in accord are *Dingwall* v. *Amalgamated Assn. Etc.*, 4 Cal.App. 565, 88 Pac. 597; and *Browne* v. *Hibbets*, 290 N.Y. 459, 49 N.E.2d 713.

The appellant in its brief says:

> "It must be emphasized this *is not* a situation where a union's constitution specifically sets forth grounds for expulsion and the union then proceeds to expel a member for reasons not listed therein. This is a case which should be determined on equitable considerations which have been expressed in similar situations by other courts."

From this premise the appellant would imply rules for the expulsion of members in the constitution and by-laws and further confer implied disciplinary powers upon the union. It relies on *Price* v. *N.L.R.B.*, 373 F.2d 443, 447 (9th Cir. 1967), where a member sought to attack the union's position as bargaining representative, which in a very real sense was an attack on the very existence of the union.

The appellant argues a strikebreaker violates a fundamental rule of unionism and can be expelled, and contends there is a fundamental right to expel a member for a substantial violation of the union's purpose. (Citing *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833.)

The appellant argues the concept that an unincorporated association has the inherent right to expel members for deliberate violations of a fundamental obligation to the association is expressed by writers on codes of parliamentary procedure. (Citing, Robert's Rules of Order, Newly Revised, p. 543.)

The most recent case of this court on the expulsion of a member from a voluntary association is *Brooks* v. *Petroleum Club of Wichita*, 207 Kan. 277, 484 P.2d 1026. There,

however, the action taken to expel the member was in substantial compliance with the bylaws of the club.

The great majority of courts have refused to look beyond the union constitution and bylaws and have emphatically denied the power of the union to punish for violations of implied obligations. (*Summers,* Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1059-1060.)

In *NLRB* v. *Allis-Chalmers Mfg. Co.,* supra, the United States Supreme Court said:

> "In addition, the judicial view current at the time §8 (b) (1) (A) was passed was that provisions defining punishable conduct and the procedures for trial and appeal constituted part of the contract between member and union and that 'The courts' role is but to enforce the contract.' In *Machinists* v. *Gonzales,* 356 U.S. 617, 618, we recognized that '(t)his contractual conception of the relation between a member of his union widely prevails in this ocuntry . . . .'" (p. 182.)

In order to determine the instant case in favor of the union it would be necessary to imply a violation of union rules and then permit the assertion of an implied power to expel members for this implied violation. Here the constitution and bylaws of the union contain no prohibition against crossing a picket line and, more significant and determinative in this case, contain no authorization for the union to expel members for any reason.

In the instant case there is an additional and controlling factor why the union has no authority to expel members and deprive them of a voice in bargaining with the company, administering the contract and handling day-to-day grievances. The contract between the company and the union was ratified by the members of the union on the 2nd day of August, 1970, whereas the meeting of the representative body to expel Cunningham and other members of the class was not held until the 15th day of August, 1970.

The contract between the company and the union establishes only two requirements for membership in the union: (1) the signing of an authorization card; and (2) payment of dues. If these two requirements are met (and there is no factual dispute concerning this) then continuation of membership is up to the discretion of the individual member. This agreement which the union has with the company expressly rejects any implied authority of the union to impose other requirements on membership. No implied powers exist and this provision explains why the union bylaws do not have provisions governing expulsion of members for reasons other than nonpayment of dues. The union here seeks to destroy what it expressly agreed to in the collective bargaining agreement—that the individual discretion of each member with respect to continuation of membership would be binding.

The judgment of the lower court is affirmed.

FROMME, J., not participating.

MOTION FOR REHEARING

(Filed August 3, 1971)

Comes now appellant by its attorneys and respectfully moves the court to set aside the Opinion, Judgment and Decree of the Court heretofore rendered and to grant a rehearing of the issues in this appeal and as grounds therefor Respondent respectfully shows the Court:

I.

The Court found that the contract which the appellant entered into with the Procter & Gamble Company barred them from exercising any disciplinary power over its members who were strikebreakers.

The lower court expressly refrained from making any such determination on this question stating that the Court "deemed it unnecessary to pass on" this point. Record P. 9.

The refusal of the court to rule on this question was not accepted to by either appellees or appellant and the appellant did not brief that question before this court.

The conclusion of the court is contrary to the facts and is erroneous as a matter of law. Further, if allowed to stand, it establishes a conflict with rights and remedies provided by the Labor-Management Relations Act as Amended, and invades the province of authority specifically delegated under that Act to the National Labor Relations Board and hence is an unconstitutional invasion of the authority of that agency in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

Under Section 8(b) (2) of the National Labor Relations Act, an employer is forbidden in any way from interferring with "the administration of a labor organization" and by virtue of judicial elucidation it has been held that as a result of such prohibition an employer cannot directly or indirectly interfere with the internal affairs of a labor organization.

For this court to hold that an employer induced a labor organization to contract away its own power to regulate its internal affairs is to conclude that the employer interfered with the internal affairs of that union and, therefore, violated Section 8(b) (2) of the Labor-Management Relations Act. The court then must hold that having violated the law the company can take advantage of such a violation and use it to protect strikebreakers. Such a theory runs into a head-on conflict with the National Labor Relations Act and the decisions of the various Federal Courts, including the Supreme Court, concerning said Act and the perti-

nent subsections relating to the interference with the internal affairs of a labor organization. Not only has the National Labor Relations Board held that it is unlawful for an employer to interfere with the internal affairs of a labor organization but it has specifically held, in addition, that it is unlawful for an employer even to demand that a union give up its inherent power to punish employees who refuse to cross picket lines on the grounds that such a disciplinary power is expressly reserved to unions by the proviso to Section 8(b) (1) (A) of the National Labor Relations Act. See *Independent Stave Company*, 175 NLRB No. 25, 70 LRRM 1497. It has consistently held that an employer has no right to attempt to limit a union's authority to discipline or fine its members for exercising what they believe to be their rights to refrain from engaging in strikes for the reason that the disciplinary power of a union over its members is not an appropriate subject of collective bargaining. See *UOP Norplex Division of Universal Oil Products*, 179 NLRB No. 111, 72 LRRM 1475. This opinion of the National Labor Relations Board has been accepted by the federal courts. See *Scofield* v. *NLRB*, 394 F.2d 49, Affirmed 393 U.S. 995. Therefore, it is clear that even if the factual conclusion which the court drew was correct, which it is not, the court would be holding that the union by inference agreed to a demand by the employer which was unlawful in violation of Section 8(a) (5) of the Act, the enforcement of which would constitute a violation of Section 8(a) (1) and 8(a) (2) of the Labor-Management Relations Act. Thus, the conclusion of the court that the contract limited the right of the union to discipline its members results ultimately in a finding that the employer had the right to interfere with a labor organization's statutory rights to prescribe its own rules with respect to the acquisition and retention of membership granted to that union by virtue of the proviso to Section 8(b) (1) (A) of

the Act. By virtue of this finding and the enforcement of the contract provision this court is making a finding that the employer can violate three separate sections of the National Labor Relations Act.

Further, the conclusion of the court that Article III of the contract was intended by the parties themselves to limit the union's right to discipline members is based upon an inference which is drawn entirely out of context. Article III of the contract is a clause which was placed in the agreement in lieu of a standard union security agreement. Ordinarily, a union security agreement states that all employees must join a union within a prescribed period. Because the State of Kansas prohibits compulsory union agreements, the only clause permissible is a discretionary one. To read a clause that states that employees may join and remain members of a union at their own discretion so as to mean that no member may ever be expelled for any reason, such as strikebreaking, is simply to read into that clause something that not only isn't there, but would also be unlawful for an employer to demand. The idea that the appellant would accept such an inhibiting and illegal clause is patently absurd. The inference which the court drew would prohibit any union with any type of union security clause from ever disciplining any of its members. Therefore, it is respectfully submitted that the court erred in making the finding (not made by the District Court) that the contract provision prevented the union from disciplining its members and that this finding and conclusion should be set aside.

II.

The court further erred in holding that the union did not have the inherent power to discipline its members and did so by failing to consider the full impact of the decision

of the United States Supreme Court in *NLRB* v. *Allis Chalmers,* 388 US 175, and by failing to consider in any manner the decision of the United States Supreme Court in *Boilermakers* v. *Hardeman,* 28 L.Ed. 2d 10 (Feb. 24, 1971), and by this error and omission the ruling of the court has created an unconstitutional conflict between the law of the State of Kansas and rights and remedies provided by Federal law by virtue of the provisions of the Labor-Management Relations Act and of the Landrum-Griffin Act, 29 U.S.C. Sec. 411, et seq.

Subsequent to the filing of briefs by all parties in this matter, the United States Supreme Court rendered an opinion in the matter of *Boilermakers* v. *Hardeman,* 28 L.Ed.2d 10 (Feb. 24, 1971). Appellants by letter of May 25, 1971, directed to the Clerk of the Kansas Supreme Court, called attention of the court to this decision. In oral argument the court's attention was directed to it.

The Hardeman case is extremely important because it established the federal law with respect to the subject matter in dispute and it reversed the holdings of the courts upon which the appellees relied in their briefs to this court. Yet this court inadvertently completely failed to consider the case! By virtue of this inadvertence and omission the court failed to understand that it had established a rule of law in conflict with the decisions of the United States Supreme Court and in contradiction with the Federal Statutory Law on the same subject matter.

The agreed upon stipulation of facts clearly reveals that the appellant and its members and the employer are governed by and their activity is protected by the provisions of the National Labor Relations Act as Amended, 29 U.S.C. 152, et seq., and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 402, et seq. The Court recognized this fact in its decision but gave no considera-

tion as to the effect this would have upon any judgment rendered by it.

In its opinion, the Court quoted a portion of a paragraph from the Allis-Chalmers decision but failed to note that the United States Supreme Court stated in that opinion that a union *does* have the inherent pc r discipline its members for strikebreaking! While the quoted partial paragraph might seem, standing alone, to give some support to the appellee's argument, the actual holding of the court when considered in connection with the Hardeman case is exactly the opposite!

In the Hardeman case the holding of the Supreme Court established a clear and unequivocal federal law on the subject. In the case the court stated that:

> "We think that this is sufficient to indicate that Sec. 101(a) (5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline (expel) its members. *And if a union may discipline (expel) its members for offenses not proscribed by written rules at all it is surely a* futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope." (Emphasis added)

Thus, the federal law on the subject, which is controlling, is absolutely in support of the appellant's position, but in its opinion the Court completely ignores it and its impact upon its judgment.

In a recent issue of the Labor Law Journal, a commentator made the following observation:

> "Union power with regard to discipline of its members is but one facet of, but represents significant problems in, maintaining power in a democratic institution. Despite the division of opinion as reflected in the *Allis-Chalmers* case (388 U.S. 175, 55 LC

¶11,972), it is axiomatic that unions must have the power and authority to fine, suspend, expel or otherwise discipline strikebreakers since the union must be capable of regulating its most effective weapon as bargaining agent. (See Summers, 'Legal Limitations on Union Discipline,' *Harvard Law Review,* Vol. 64, p. 1049). The union's need to control the conditions and acts of its members at times of a strike or other crisis appears fundamental to the solidarity of union power. Over 20 years ago Professor Clyde Summers observed that union discipline upon a convicted member is unquestionably a penalty ('Disciplinary Procedure of Union,' *Industrial and Labor Relations Review,* Vol. 4, p. 15), and that strike-breaking 'undercuts the union's principal weapon and defeats the economic objective for which the union exists.' (*Industrial and Labor Relations Review,* Vol. 3, p. 495). Professor Cox has observed that 'dissent in a union, like treason within a nation, must be suppressed if the purpose is to destroy the union, encourage a rival, or bring about the violation of legal or contractual obligations . . .' ('Internal Affairs of Labor Unions under the Reform Act of 1969,' *Michigan Law Review,* Vol. 58, p. 834.) In *UAW, Local* 248 v. *Werb,* the Wisconsin Supreme Court said:

> 'A union without power to enforce solidarity among its members, when it resorts to a strike in an effort to force an employer to agree to its collective bargaining demands, is a much less effective instrument of collective bargaining than a union which possesses such power. Therefore, there is an intimate connection between the right of a union to fine members, who cross a picket line in order to continue to work during a strike called by the union, and the incidents of collective bargaining sought to be regulated by the Labor-Management Relations Act. . . (11 Wis. 2d 277, 41 LC ¶16,564, *cert. denied,* 365 U.S. 878 (1961).)'

"The *Allis-Chalmers* decision makes it clear that it is part of the federal scheme to allow a union to protect

> itself against erosion at the time of a strike. Clearly, unions should be free from judicial restraint that would prescribe limitations on the internal and economic policies of the union; such limitations are essentially political in nature and should be resolved by the legislative process. Courts and agencies should enjoin union power only when such power compels violation of policies formulated by the legislature. (Ibid., at 11 Wis. 2d, at p. 288). Regulation of union power should not be aimed at the policies themselves but rather to 'protect the processes within the union by which union policies are determined.'."
>
> (Schneidman, Daniel L., *CCH Labor Law Journal*, July, 1971, P. 424).

At the time the above Article was written the writer obviously did not have the decision of the United States Supreme Court in the Hardeman matter before him. However, the Court in Hardeman followed exactly the rationale of the Article and in substance reversed each and every Federal case upon which the Appellees had relied.

The opinion of the court in this case totally ignored Federal law as enunciated by the United States Supreme Court. In addition, under the theory of attempting to apply contract law, the court established legal conclusions which are in conflict with Sections 8(a) (1), 8(a) (2) and 8(a) (5) of the Labor-Management Relations Act as amended, which protects unions in establishing their own rules with regard to acquisition and retention of membership, which prevents employers from bargaining in bad faith by prohibiting parties from including in collective bargaining contracts provisions which interfere with the internal affairs of labor organizations, and from enforcing contracts which give to employers the right to dominate and interfere with the internal affairs of a labor organization. Further, the ruling of the Court conflicts with the Labor-Management Reporting and Disclosure Act. In ad-

dition, since this is a suit for an alleged breach of contract it falls within the provisions of Title III of the Labor-Management Relations Act. As such, the United States Supreme Court has specifically held Federal Law *must* be applied and any contradictory state law must be set aside. *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571.

It is, therefore, respectfully requested that since the factual conclusion drawn by the court is based purely on improper and untenable inference and is itself unlawful, and since the judgment of the court is in conflict with Federal Statutory law and is absolutely contradictory to the decisions of the United States Supreme Court, that judgment should be set aside and judgment should be entered for appellants.

ORDER DENYING REHEARING

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing by Appellant.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date August 13, 1971

JUDGMENT

(Filed August 16, 1971)

Dist. Court No. 39504-B
No. 46325

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

The State of Kansas, to the District Court within and for the County of Wyandotte in the State of Kansas, Greeting:

WHEREAS, In a certain civil, action lately pending before you wherein Florence N. Cunningham, et. al. were plaintiff and The Independent Soap & Chemical Workers of Kansas City, Kansas were defendant a judgment was rendered by you against the said defendant from which judgment said defendant prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the July Session of the July Term of said Supreme Court, A. D. 1971, on consideration of the said appeal ..... it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be affirmed and that the said ..... recover against the said ..... Dollars for ..... costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs of .....
Fees of Clerk Supreme Court ..... Paid
*Abstract fee of .....
*Transcript .....
*Other costs .....
Total .....$ Paid

WITNESS my hand and the seal of said Supreme Court affixed hereto, at my office, in the City of Topeka, on the 13th day of August A. D. 1971

/s/ Lewis C. Carter
Lewis C. Carter
Clerk of the Supreme Court.

APPELLANT'S MOTION TO STAY MANDATE

(Filed August 17, 1971)

Now comes Appellant by its attorneys and moves the Court to stay the Mandate of this Court upon its judgment and decision in this cause for a period of not less than ninety days in order to afford Appellant the opportunity to prepare and present to the Supreme Court of the United States its petition for a Writ of Certiorari to review the decision of this Court heretofore rendered in this cause.

For grounds for this motion, Appellant respectfully shows the Court it is aggrieved by the judgment and decision of this Court in this cause; that the matters at issue herein are of public importance and should be considered and finally determined by the Supreme Court of the United States; and that, in order for the Appellant to make an appropriate presentation to said Court it will be

*NOTICE: Pay costs of abstracts and other items, except costs of Clerk of Supreme Court, direct to proper parties.

required to prepare and submit not only the petition for the Writ but a printed appendix thereto containing such parts of the record as are necessary for proper consideration of said petition.

Appellant further states that the rights of the Appellees herein will not be seriously impaired by the granting of the motion.

WHEREFORE, Appellant prays the Court to enter an order herein staying the Mandate of this Court for a period of not less than ninety (90) days from the date of said order.

/s/ James H. Barnes
James H. Barnes
434 Brotherhood Building
Kansas City, Kansas

/s/ Robert S. Fousek
Robert S. Fousek
3333 Warwick
Kansas City, Missouri 64111

NOTICE OF ORDER OVERRULING MOTION FOR STAY OF MANDATE

You are hereby notified of the following action taken in the above entitled case:

Appellant's motion to Stay Mandate.

Appellant's motion to stay issuance of Mandate is Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date August 17, 1971.

PETITION

(Filed August 19, 1970)

1. Plaintiff, Florence N. Cunningham, and other members of the class hereinbelow described, are and were at all times relevant members of The Independent Soap & Chemical Workers of Kansas City, Kansas, the defendant, and employees of Procter & Gamble Manufacturing Company at its Kansas City Plant.

2. Defendant, The Independent Soap & Chemical Workers of Kansas City, Kansas, is an unincorporated labor organization representing employees of Procter & Gamble Manufacturing Company, with its principal office located within the district of this Court. During all times relevant, Omer C. Jones was President of the defendant union.

3. This action is brought on behalf of plaintiff and all members of a class similarly situated as shown by the facts hereinafter alleged. Plaintiff alleges that said class is so numerous, consisting of more than one hundred (100) individuals, that joinder of all members as plaintiffs is impracticable; that there are questions of law and fact common to the class; that the claims of the plaintiff are typical of the claims of the class and that the plaintiff will fairly and adequately protect the interests of the class. That the defendant has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

4. Beginning on or about August 4, 1970, and continuing to date, defendant has violated the rights of plaintiff and other members of said class by the following actions and conduct:

(a) On August 4, 1970, by directing plaintiff and other members of the class to appear before the Representative Body of defendant to review certain conduct, which directive was not authorized, permitted, or sanctioned by the constitution and bylaws of defendant union;

(b) On August 15, 1970, by conducting a purported hearing before the Representative Body of defendant to review certain conduct of plaintiff and other members of the class and to recommend their expulsion from membership in defendant union, at which time and hearing plaintiff and other members of the class were not given reasonable time to prepare their defenses, were denied the assistance of counsel, were not accorded a full and fair hearing;

(c) On August 16, 1970, by purportedly voting and proceeding to expel plaintiff and other members of the class from membership in defendant union without any constitutional bylaw, or other authorization for said action;

(d) On August 16, 1970, by purporting to expel plaintiff and other members of the class from membership in defendant union, which expulsion procedure is not permitted, authorized or sanctioned by the constitution and bylaws of defendant union and is therefore null, void and of no legal effect; and in violation of the contractual rights of plaintiff and other members of the class;

(e) By the foregoing acts, purporting to deny plaintiff and other members of the class the right to vote at the election scheduled for the nomination of officers on August 21, 1970, for the reason that they are allegedly not members in good standing.

5. By the foregoing actions and conduct, defendant has infringed upon the rights of plaintiffs and other members of the class, and violated their rights, in that:

(a) They have been and will be denied the right to vote in elections or referendums of the defendant labor organization, to attend membership meetings, and to participate in deliberations and voting upon the business of such meetings;

(b) Defendant union proceeded to expel plaintiff and other members of the class although such expulsion was not sanctioned, authorized, or permitted by the constitution and bylaws of defendant union, and therefore the rights specified in the preceding subsections have been and will be denied them for reasons other than rules and regulations contained in the constitution and bylaws of defendant union;

6. The constitution and bylaws of the defendant union (a copy of which is attached hereto as Exhibit A and incorporated herein) does not empower or in any way authorize defendant union to expel plaintiff and other members of said class. Therefore, the actions concerning the expulsion of plaintiff and other members of the class were null, void, and in breach of constitutional and contractual rights of plaintiff.

7. That defendant is an independent union and plaintiff and other members of the class have no available union remedies and have no adequate remedy at law and will suffer irreparable harm unless the Court exercises its equitable jurisdiction in the premises.

WHEREFORE, plaintiff prays that this Court protect and enjoin infringement of contractual and constitutional rights of plaintiff and other members of the class by:

(a) Declaring that the defendant union was not authorized to expel plaintiff and others similarly situated under the constitution and bylaws of the union;

(b) Enjoining defendant union from interfering or infringing upon the rights of plaintiff and other members of the class to vote in the election of August 21, 1970, and other elections or referendums, to attend membership meetings, and to participate in the deliberations and the voting upon the business at such meetings;

(c) In the alternative, if a full determination of the respective rights of the parties cannot be expeditiously determined before the August 21st election, plaintiff prays this Court by its injunctive powers

(1) Order and require defendant to permit plaintiff and others similarly situated to vote in said August 21, 1970, nominating election, and to impound these ballots and the ballots of other members until resolution of the issues herein, and delay any other elections of officers or representatives until said resolution; or, if this impounding procedure is not deemed appropriate,

(2) Enjoin the holding of the nominating election of April 21, 1970, until the respective rights of the parties are resolved herein.

Plaintiff further prays for her costs and expenses incurred herein and for the reasonable fees of her attorneys.

ANSWER

(Filed September 8, 1970)

Comes now the Defendant and for its answer to the petition in the above entitled matter states the following:

1. Defendant admits paragraph 1 of said petition.
2. Defendant admits paragraph 2 of said petition.
3. Defendant admits paragraph 3 of said petition.

4. Defendant denies paragraph 4 subparagraphs (a), (b), (c), (d), (e) and paragraphs 5, 6, and 7 of said petition.

WHEREFORE, Defendant having fully answered, Defendant prays that this matter be dismissed.

(Served by mail September 8, 1970.)

MEMORANDUM OPINION

(Filed November 10, 1970)

Chambers of

HARRY G. MILLER, JR.
Judge Twenty-Ninth Judicial District
Division No. 3
Kansas City, Kansas 66101

November 10, 1970

Mr. George Maier
Mr. Jack L. Whitacre
Mr. Robert Fousek
Mr. James H. Barnes
Attorneys at Law

Re: Cunningham v. Independent Soap & Chemical Workers, No. 39504-B

Gentlemen:

This action has been submitted to me on a stipulation of facts and briefs. The last brief was filed on October 20, 1970.

The crux of the argument is whether or not the defendant union has the right to expel or discipline its members for conduct considered detrimental to the union in the absence of any enabling provisions in its constitution

or by-laws. It is the Union's contention that it has the inherent right to do so.

A perusal of the constitution and by-laws of the Union discloses no rule or mention of any kind concerning the expulsion or discipline of members. Other than a provision that membership is automatically terminated if dues become more than three months in arrears, there is no rule regarding the procedure, the grounds or the right of the Union to terminate membership.

The weight of authority is that a union may not punish its members for violations of implied obligations. (Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 at 1059).

In Simmons vs. Avisco Local 713, 350 P. 2d 1012 (1965), the Court in ordering the reinstatement of a member expelled for an offense not authorized by the constitution, stated the rule as follows:

> "It is established law that a union cannot discipline its own members except for offenses stated in the constitution and by-laws, and that the courts had no power to recognize 'implied offenses' and thereby rewrite the union's constitution and by-laws." (p. 1017)

No attempt is made here to pass upon the propriety of plaintiff's conduct in crossing the picket line. It is not a question of whether this was right or wrong, although, admittedly, there is perhaps no greater offense in the eyes of a labor union. Nevertheless, the union in its relations with its members, is governed by its constitution and by-laws. In Radio Station KFH Co. vs. Musicians Assn., 169 Kan. 596, the Court stated:

> "Voluntary associations have the right to make their own regulations as to admission or expulsion of members; and one who becomes a member assents, by his

membership, to the constitution and procedure adopted by the association. The constitution, rules and by-laws of a voluntary, unincorporated association constitutes a 'contract' between the association and its members and the rights and duties of the members as between themselves and in their relation to the association in all matters affecting its internal government and the management of its affairs are measured by the terms of such constitution and by-laws."

No reason suggests itself why the Union here should not be required to establish reasonable rules and regulations regarding the expulsion and discipline of its members if it intends to exercise such power. The right to make rules with respect to the acquisition or retention of membership in a union is recognized and protected by section 8(b)(1) of the National Labor Relations Act. The provisions of section 411(a)(1)(2) of the Labor Management Reporting and Disclosure Act requiring that certain rights of members of a union may be affected only if permitted by "reasonable rules and regulations in such organization's constitution and by-laws" also indicate a congressional intent that membership rights should be covered by reasonable rules and regulations in the union constitution and by-laws. In the absence of any such rules and regulations, a union, or its officers, are left free to discipline members for almost any conduct which it is desired to punish.

It is therefore my opinion that the Union does not have the inherent right to expel its members for violation of implied obligations, and that in the absence of any rules or regulations in its constitution or by-laws governing this matter, the Union was not authorized to expel the plaintiff in this case.

This ruling is to be effective three days from this date. Will you please present an approved journal entry consistent with this ruling for my signature.

Yours very truly

/s/ Harry G. Miller
Harry G. Miller

JOURNAL ENTRY

(Filed November 21, 1970)

On August 18, 1970, plaintiff brought this class action on behalf of herself and others similarly situated against defendant union praying that this Court declare that the constitution and bylaws of defendant union do not authorize the union to expel plaintiff and the members of the class and enjoin defendant union from interfering with or infringing upon the membership rights of plaintiff and the other members of the class.

Certain preliminary matters involving a union nominating election were the subject of a record stipulation on August 19, 1970.

On September 2, 1970, defendant filed its answer admitting and denying certain of the allegations.

On October 9, 1970, plaintiff, appearing through George Maier of Weeks, Thomas, Lysaught, Bingham & Johnston and Jack L. Whitacre of Spencer, Fane, Britt & Browne, and defendants, appearing through Robert S. Fousek of Manning & Fousek and James H. Barnes, entered into and filed with the Court a Stipulation of Facts, with the parties waiving the right to present further testimony or other evidence. The parties stipulated to facts concerning the nature of the class, the common questions involved, the

representation of plaintiff and the general action against all members by defendant, and the Court determined the class action to be appropriate.

Briefs were filed by both parties, the last brief being filed on October 20, 1970.

Then on November 10, 1970, this Court issued its memorandum opinion finding as follows:

(1) There is no rule in the defendant's constitution and bylaws regarding the procedure, the grounds, or the right of the union to terminate membership other than a provision (not here involved) that membership is automatically terminated if dues become more than three months in arrears;

(2) The union may not punish its members for violations of implied obligations and this Court does not recognize so-called "implied offenses" and thereby rewrite the union's constitution and by-laws;

(3) The union, in its relations with its members, is governed by its constitution and bylaws and the rights and duties of the members as between themselves and in their relationship with the union in all matters affecting internal government and the management of its affairs must be determined by the terms of such constitution and by-laws;

(3) The union, in its relations with its members, is governed by its constitution and bylaws and the rights and duties of the members as between themselves and in their relationship with the union in all matters affecting internal government and the management of its affairs must be determined by the terms of such constitution and by-laws;

(4) In the absence of reasonable rules and regulations in the defendant's constitution and bylaws, defend-

ant has no authority or power to discipline its members by expulsion;

(5) The Court therefore holds that the union does not have the inherent right to expel its members for violation of implied obligations, and that, in the absence of reasonable rules or regulations in its constitution and bylaws governing this matter, the union was not authorized to expel the plaintiff or the class of members in this case.

The Court deemed it unnecessary to pass on whether the provision in the union's collective bargaining agreement concerning rights to membership further restricts the union in its attempt to expel plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

(1) That plaintiff and all other similarly situated as described in the petition constitute an appropriate class with a right of class action under Kansas statutes thereby making appropriate this final injunctive and declaratory relief with respect to the class as a whole;

(2) That defendant union was not empowered, able or authorized to expel plaintiff and other members of the class under its constitution and bylaws and plaintiff and all other members of the class herein continue to be members of defendant union with full rights as such.

(3) That defendant union, its officers, representatives and agents should be, and they hereby are, permanently enjoined from interfering with, or infringing upon, the membership rights of plaintiff and other members of the class to participate and vote in elections or referendums held by defendant union, to attend membership meetings, to hold office as officers or representatives, or to fully participate in any and all respects in the business of defendant union, except as expressly permitted by the

constitution and bylaws pursuant to fair and reasonable procedures;

(4) That all ballots cast in the August 21, 1970, election including those of the plaintiff and the class, be counted and the election proceeded with under the direction and supervision of the election committee as set forth in the constitution and bylaws of defendant; and

(5) This judgment and order is effective November 14, 1970, and shall remain in effect until further order of this Court.

.....
Judge

NOTICE OF APPEAL

(Filed December 1, 1970)

TO FLORENCE CUNNINGHAM, Plaintiff:

Comes now the Defendant, The Independent Soap & Chemical Workers of Kansas City, Kansas, and files its Notice of Appeal from the judgment, all rulings adverse to the Defendant, and the injunctive order of the District Court of Wyandotte County entered on the 23rd day of November in the above entitled matter.

Dated this 1st day of December, 1970.

(Served by mail December 1, 1970.)

APPELLANT'S POINTS OF ERROR

(Filed December 4, 1970)

1. The court erred in finding that the Defendant Union may not punish its members for violations of im-

plied obligations to the union, particularly for going through the union's picket line and returning to work.

2. The court erred in holding that the Union does not have the inherent right to expel its members for violations of implied obligations, particularly for crossing the Union's picket line and returning to work.

(Served by mail December 3, 1970.)

STIPULATION OF FACTS

1. The Independent Soap & Chemical Workers of Kansas City, Kansas, hereinafter referred to as the "Union," is an unincorporated association, and a labor organization within the meaning of Section 2 (5) of the Labor-Management Relations Act as amended. It is recognized as the exclusive collective bargaining representative of a bargaining unit composed of certain employees (including members of the alleged class) of Procter & Gamble Manufacturing Company at its plant located in Kansas City, Kansas and is engaged in an industry affecting commerce as defined in Section 3 (J) of the Labor-Management Reporting & Disclosure Act of 1959. At all times material hereto the Union had approximately 500 members.

2. The Articles of Constitution of the Union are attached hereto as Exhibit A.

3. Procter & Gamble Manufacturing Company, hereinafter referred to as the "Company," is a corporation operating a manufacturing plant in Kansas City, Kansas, and sells and ships more than $500,000.00 worth of finished products in an average annual year from Kansas City, Kansas to points outside of the State of Kansas. It is engaged in commerce within the meaning of Sections 2 (6) and 2(7) of the Labor-Management Relations Act as amended.

4. The Union and the Company have been parties to collective bargaining agreements since approximately 1937. In 1964 the parties entered into a contract which provides for reopening the contract by 60 days' notice prior to December 29, 1967. Such notice was given by the Union to the Company and subsequent thereto a notice to terminate the agreement was given by the Union. From December 29, 1967, up to August 2, 1970, the Union and the Company were unable to arrive at a new agreement.

5. On or about July 9, 1970, certain employees of Procter & Gamble who were members of the Union concertedly refused to work in protest over certain disciplinary action taken by the Company which disciplinary action was the subject of grievances filed by the Union. On the morning of July 10, 1970, these employees congregated about the gates of the plant with picket signs and on-strike signs. This picket line was not authorized at this time by the Union. A majority of the employees reporting for the first shift of work on July 10, 1970, refused to cross this picket line.

6. On July 10, 1970, and July 11, 1970, the Union scheduled a membership meeting for Sunday, July 12, 1970, and publicized the meeting by announcements made by the radio and television media.

7. On July 10, 1970, Procter & Gamble Manufacturing Company instituted an action in the Wyandotte County District Court to enjoin the Union from engaging in mass picketing and violence about the entrances to the plant. A temporary injunction was issued to this effect by the Court. This injunction did not enjoin the strike itself.

8. On July 12, 1970, a Union meeting was held among the members to discuss the strike action and picketing engaged in by certain of its members. At this meeting, those

members of the Union present voted "to strike until the disciplinary action was resolved and the contract negotiations were completed." Approximately 375 members of the Union were present and voted on the question.

9. The named plaintiff and others in the class described in the petition were members of the Union, some having been members of the Union for as long as 20 or 25 years. Some of the employees who voted to expel plaintiffs were members of the Union for 33 years. Each of the class who heard the radio or television announcements of the July 12 meeting had an opportunity to participate in the discussions and vote at this meeting. Subsequently, each member of the class knew the Union had voted to strike and to concertedly refuse to render services. Each knew that the Union had directed all members not to work.

10. Section 7 of the Labor-Management Relations Act as amended provides that:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

11. Section 8(b)(1) of the National Labor Relations Act provides:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *PROVIDED*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

12. Between July 12, 1970, and August 2, 1970, the Union was on strike. The Union placed pickets at employee entrances to the plant. On August 2, 1970, the Union membership called to a meeting pursuant to written mail notices, voted to terminate the strike and the strike was terminated. At this time the terms of a new contract which had been tentatively agreed upon by Procter & Gamble and the Union were ratified by the membership. A copy of that contract is attached hereto as Exhibit B.

13. Neither the new contract nor the prior contract entered into in 1964 contained any provision for union security, i.e., no employee was required as a condition of employment to become a member of the Union. Under the law in Kansas, unions and employers cannot enter into any agreement which required membership in a union as a condition of employment.

14. During the period referred to in the second preceding paragraph, and while pickets were placed at the entrances to the plant, and the strike was in progress, at various times and on various dates after July 12, 1970, the plaintiff and other members of the class returned to work and performed work for Procter & Gamble Manufacturing Company.

15. On August 2, 1970, the membership of the Union, at a special meeting called by mail notices, voted to direct the bargaining committee to institute proceedings against members of the class.

16. On or about August 4, 1970, the Union by its bargaining committee notified by Certified Mail plaintiff and other members of the class that each had been charged with going back to work and crossing the picket line, a copy of which notice of charges and date scheduling a hearing is attached hereto as Exhibit C.

17. On August 15, the Representative Body met to review the charges made by the bargaining committee. There are approximately 30 members on the Representative Body. Plaintiff Cunningham and four other members of the class were also elected members of the Representative Body. At this meeting of the Representative Body, the names of each of the employees alleged to have returned to work and to have crossed the picket lines were read and if a member present at this meeting stated that he or she had observed one of the class crossing the picket line this was noted and the number of witnesses recorded. Four in the named class appeared and admitted that they crossed the picket line and returned to work. All others in the named class attempted to appear by counsel but this appearance by counsel was denied by Union officers. Plaintiff, on her behalf and on the behalf of others, attempted to have the firm of Spencer, Fane, Britt & Browne, by attorneys, James Willard and E. J. Holland, Jr., participate as their counsel at the hearing but no attorneys were allowed to participate in the hearing either for or against the plaintiffs. Except as indicated, none of those in the alleged class appeared and participated in person at the hearing. No attorneys were present for the Union. Two documents were offered to the officers of the Union at the entrance to the hearing room by the attorneys for plaintiff and certain of the named plaintiffs, which documents are attached hereto as Exhibits D and E. The officers of the Union refused to accept these documents and asked the attorneys to leave whereupon the attorneys deposited

the documents on the floor next to the feet of the officers. Plaintiff refused to testify at the hearing.

18. The firm of Spencer, Fane, Britt & Browne, and J. D. Lysaught have on frequent occasions been employed by the Company in handling its legal problems with the Union in matters concerning labor relations. It was this firm, during the strike, that secured the temporary injunction on behalf of the Company referred to above.

19. On August 7, 1970, after the strike was terminated and a new agreement reached, the parties voluntarily and jointly dismissed the injunction petition referred to above.

20. Procter & Gamble Manufacturing Company, upon being advised that disciplinary action was being contemplated against the class by the Union, advised its employees that they would pay the legal fees of their own counsel or regular Company counsel for the purpose of defending against the alleged disciplinary action and to protect their statutory and common law rights.

21. Statements made by other members at the August 15, 1970, meeting of the representative body indicated and disclosed that the named plaintiff (and all except two in the class) had in fact crossed the Union's picket line and gone back to work while the strike was in progress as set forth above.

22. The representative body recommended that plaintiff and others who were found to have gone back to work be expelled from membership and that their recommendation be taken to the membership of the Union for approval or disapproval. No action was taken as to the two concerning whom no statements were made, but the charges were not dismissed as to these two.

23. On August 16, 1970, pursuant to written, mailed notice, a general membership meeting of the Union was

held at which meeting those present voted 156 to 8 to expel the class from the Union. The plaintiff and each of the named class were notified of this meeting and vote but plaintiff and others in the class did not appear at the meeting.

24. A nominating election was conducted by the Union on August 21, 1970. By agreement between counsel the plaintiff and the other expelled members were allowed to vote but their ballots were segregated and all ballots so segregated were impounded pending an appropriate determination of the legal questions involved in this proceeding.

25. The Union maintains no retirement, death benefit, funeral benefit, or similar benefit fund of its own and thus the members of the class do not have any monetary rights to any funds if such eventualities should occur in the future.

26. Plaintiff and members of the class have as required paid monthly dues to the Union on each month to and including July, 1970, some members of the class having paid such dues for as long as 20 and 25 years. Some of the members who voted to expel plaintiff were also members for as long as 33 years.

27. The class herein is so numerous that joinder of all members as plaintiffs is impractical. The questions of law and fact raised by this action are common to all members of the class. The claims of the plaintiff are typical of the claims of the class and the plaintiff fairly and adequately represents and protects the interests of the class. The Union has acted on grounds generally applicable to the class, thereby making appropriate relief with respect to the class as a whole.

28. Admissions or stipulations made in this document are for the purpose of this proceeding and pending action

only and neither constitute an admission by the parties for any other purpose nor may be used against the parties or others in any other proceeding.

EXHIBIT A

Articles of Constitution

The only pertinent sections of Exhibit A, which is the Constitution of Petitioner, are Articles III and IV, which Articles provide as follows:

Article III—Eligibility

Any employee (except members of the supervisory forces, which include supervisors, foremen, sub-foremen and other persons on personnel payrolls), and who is an American citizen is entitled to become a member of this Union.

Atircle IV—Dues

a. The dues of the members of this Union shall be the sum of two ($2.00) dollars per month. All members entering the Union shall be requested to sign a dues deduction card authorizing the company to deduct dues monthly from his or her earnings. The initiation fee shall be nothing.

The amount of dues and initiation fees payable by members of this labor organization shall not be increased and no general special assessment shall be levied upon members except by a majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such question has been given the membership.

If members shall be in arrears more than three months in payment of said dues, their membership shall be automatically terminated.

b. In case of illness or disability, the dues may be waived by the representative body until such time as the employee returns to work.

EXHIBIT B

III. Union Membership & Collection of Dues

1. Any employee who is, or becomes, a member of the Union by signing an authorization card may at his own discretion remain a member in good standing during the life of this Agreement. In case of illness or disability *or leave of absence due to lack of work* dues will be waived until the employee returns to work.

The Employer will deduct from the second pay day each month the Union dues for the current month of an employee who voluntarily signs an authorization card, and will pay the dues promptly to the Treasurer of the Union. The authorization may be cancelled by the employee in writing at any time.

2. The Employer agrees that it will not discriminate against an employee because of membership in the Union. The Union agrees that there shall be no Union activity on the Employer's time or on the plant premises except (a) as allowed under the provisions of this Agreement, (b) when an employee not on the job confers with other employees not on jobs at times such as relief periods, lunch time, and at the start or end of their regular shifts.

FEDERAL STATUTES INVOLVED

The questions here presented relate to provisions of the following Statutes:

I. Labor Management Relations Act, 1947, as amended, Title 29 U.S.C. 141, et seq., the pertinent parts of which are as follow:

Section 301(a).

Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 158(a)(1).

It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 158(a)(2).

It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. Provided that subject to rules and regulations made and published by the Board pursuant to Section 6 an employer may not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

Section 158(a)(5).

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees subject to the provisions of Section 9(a).

Section 158(b).

It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided*, That this paragragh shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

II. The Labor Management Reporting and Disclosure Act:

29 U.S.C. Section 411

Subsection (a)5.

No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with specific charges; (B) given a reason-

able time to prepare his defense; (C) accorded a full and fair hearing.

29 U.S.C. Section 412.

Any persons whose rights secured by the provisions of this title have been infringed by any violation of the title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the District Court of the United States where the alleged violation occurred or where the principal office of such labor organization is located.

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 4 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-484

THE INDEPENDENT SOAP & CHEMICAL WORKERS OF KANSAS CITY, KANSAS,
Petitioner,

vs.

FLORENCE N. CUNNINGHAM, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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The Independent Soap & Chemical Workers of Kansas City, Kansas prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Kansas entered in the above entitled case on August 13, 1971, pursuant to an opinion filed July 15, 1971, after a motion for rehearing was denied on August 13, 1971.

The Opinion of the Supreme Court of Kansas is as yet unreported and appears in the Appendix filed separately herewith at pp. 1-13.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19(a) of the Rules of the United States Supreme Court.

QUESTIONS PRESENTED

1. Whether a contract, made by and between an employer engaged in commerce within the meaning of Sections 2(6) and 2(7) of the National Labor Relations Act as amended and a union engaged in representing employees in an industry affecting commerce, may be interpreted and construed by a state court without reference to Federal Substantive Law and in conflict with Federal Substantive Law particularly by determining that a modified union security clause deprives a union of the right to expel any of its members and thereby deny to employees their rights to self organization to bargain collectively and engage in concerted activities as set forth in Section 7 of the National Labor Relations Act as amended and to take away from a union a power expressly reserved to unions by the Proviso to Section 8(b)(1)(A) of said Act, and make it possible for an employer to interfere with the internal affairs of a labor organization in violation of 8(a)(2) of said Act.

2. Whether a state court, in construing the constitution and by-laws of a union, may determine, contrary to the Decisions of the United States Supreme Court in interpreting and applying the provisions of the Labor-Management Reporting and Disclosure Act, that a union is powerless to expel strikebreakers and thereby deprive the union of the economic objective for which the union exists and thus deny to employees their rights to engage

in concerted activity for the purpose of collective bargaining or other mutual aid and protection as set forth in Section 7 of the National Labor Relations Act, and to deny to the union the right to make its own rules with regard to the acquisition and retention of membership as protected by the Proviso to Section 8(b)(1)(A) of said Act.

STATEMENT OF THE CASE

Suit was filed by the Respondents seeking reinstatement in the union after they had been expelled for strikebreaking. Trial was waived and all facts were stipulated. The stipulation is contained in the Appendix at pp. 36-43.

Respondents based their claim for relief essentially on two grounds. First, that the constitution and by-laws of the union contained no provisions at all relating to expulsion and that in their absence the union had no right to expel members. Second, the labor agreement entered into between the petitioner and the employer contained a clause allegedly which prohibited the union from expelling strikebreakers, and therefore their expulsion violated the labor agreement. (A 26)

The District Court ruled that in the absence of a clause relating to expulsion a union had no inherent right to expel members for strikebreaking. The court refused to rule on the allegation that the labor agreement barred expulsion. (A 34)

On appeal, the Supreme Court of Kansas affirmed but added as a basis for its decision that the labor agreement between the Union and the Employer prohibited expulsion of members. (A 12-13)

Petitioner called the court's attention in its brief and in its Motion For Rehearing that rulings made in the

District Court and by that court were in conflict with the Decisions of this Court and those of the National Labor Relations Board in interpreting the National Labor Relations Act of 1947 as amended, 29 U.S.C. 141 et seq., particularly Sections 157, 158(a)(1), 158(a)(2); Section 301(a) of said Act; and The Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411(a)5. (A 13-21) The Supreme Court of Kansas without opinion overruled Petitioner's Motion for Rehearing. (A 21)

REASONS FOR GRANTING THE WRIT

1. In interpreting the labor agreement the State Court was bound to follow Federal Law as this court held in *Teamsters Union* v. *Lucas Flour,* 269 U.S. 95, but instead it created a state rule of law on the subject matter which involves a federal question of substance in a manner which is not in accord with the applicable decisions of this court.

This court has held that in construing labor agreements state courts must apply federal substantive law. *Teamsters Union* v. *Lucas Flour,* supra. The court below construed a modified union security clause[1] which read as follows:

> "III. *Union Membership & Collection of Dues.*
>
> "1. Any employee who is, or becomes, a member of the Union by signing an authorization card may at his own discretion remain a member in good standing during the life of this Agreement. In case of illness or disability or leave of absence due to lack of work dues will be waived until the employee returns to work.

---

1. The State of Kansas has a Right-To-Work Law which prohibits *compulsory* union membership.

"The Employer will deduct from the second pay day each month the Union dues for the current month of an employee who voluntarily signs an authorization card, and will pay the dues promptly to the Treasurer of the Union. The authorization may be canceled by the employee in writing at any time.

"2. The Employer agrees that it will not discriminate against an employee because of membership in the Union. The Union agrees that there shall be no Union activity on the Employer's time or on the plant premises except (a) as allowed under the provisions of this Agreement, (b) when an employee not on the job confers with other employees not on jobs at times such as relief periods, lunch time, and at the start or end of their regular shifts."

In interpreting this clause the lower court was limited to an examination of the contract clause standing alone without any other evidence concerning the intent of the parties. Hence, its conclusion was a purely legal conclusion with no other factual basis for its support. The conclusion of the court is completely erroneous and establishes as a *federal* rule in Kansas that no union that has any type of voluntary union security agreement can expel its members for strikebreaking.

This ruling ignores the holdings of the National Labor Relations Board that an employer has no right to attempt to intrude upon a union's right to discipline members which right is specifically reserved to the Union under Section 8(b)(1)(A) of the Act. *Independent Stove Co. v. Chauffeurs International Union*, 175 NLRB No. 25. An insistence by the employer of such a clause would constitute a violation of Section 8(a)(5) of the National Labor Relations Act. *UOP Norplex Division of Universal Oil Products*, 179 NLRB No. 111. See also, *Scofield* v. *NLRB*, 393 U.S. 995.

By drawing such a legal conclusion from the most tenuous of inferences, the Kansas Supreme Court deprived the union of its inherent right to discipline its members which this court held the Union to possess in *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, and *Boilermakers* v. *Hardeman*, 28 L.Ed.2d 10.

The construction which the lower court gave to the contract clause is completely unrealistic for on its face the clause does not even refer to a union's power to discipline its members. As a matter of federal law this court has held that strikebreaking is uniformly considered to be adequate cause for discipline. Only upon a showing by the most clear and convincing evidence should this right be deemed to have been bargained away in a contract with the employer. The lower court's opinion gave to the employer a power over internal union affairs which the National Labor Relations Board would deny it under Section 8(a)(5) of the National Labor Relations Act and permitted an invasion in the internal affairs of a union which was expressly reserved to unions by the Proviso to Section 8(b)(1)(A) of the Act.

A second reason for granting a writ is that in interpreting the constitution and by-laws the court found that the Union was powerless to determine who could become or remain members of the union specifically holding that the Union could not expel members for any reason regardless of whether or not their conduct was designed to defeat the very purpose for which the union was created.

Under Section 7 of the National Labor Relations Act employees are given the right to self organization and to bargain collectively through representatives of their own choosing. The decision of the lower court takes away that right for the reason that it compels members of a labor

organization to retain in their ranks persons who have expressly attempted to thwart the union in the most fundamental way and in fact destroy it as an effective collective bargaining representative.

A union must possess the power to fine or suspend members since the union must be capable of regulating its most effective weapon as bargaining agent. A union without power to enforce solidarity among its members cannot be an effective instrument of collective bargaining. Therefore, there is an intimate connection between the right of a union to discipline members who cross a picket line and the right to bargain collectively, protected by Section 7 of the National Labor Relations Act, and a union's right to make its own rules with reference to acquisition or retention of membership. In fact it has been specifically held by at least one State Supreme Court that a State Court is totally without jurisdiction to impinge upon those rights on the grounds of federal preemption. *United Auto Workers* v. *Wisconsin Employment Relations Board*, 11 Wisc. 2d 277, Cert. Denied 365 U.S. 878.

The lower court, however, not only exercised jurisdiction which the Supreme Court of Wisconsin found not to exist, but exercised it in a manner which deprived employees of their rights protected by Section 7 and took away an authority reserved to Unions by the Proviso to 8(b)(1)(A) of the Act.

The lower court brushed aside the federal question by simply stating that "Since this is a matter of contract law it is *essentially* a matter of state law." (A 9) The court then proceeded to ignore all of the federal judicial precedents and federal statutes which spelled out rights and remedies and proceeded to render an opinion which was in conflict with the opinions of this court and which impinged upon rights protected by federal law.

The Petitioner, on the other hand, carefully followed the provisions of Section 411(a)(5) of the Labor-Management Reporting and Disclosure Act as interpreted by this court. It gave written specific notice of charges. It provided full opportunity to Respondents to prepare their defense. It gave opportunity to be heard. It then additionally submitted the question of penalty to the membership. In the middle of an election these proceedings were instituted in the state court. Had the case been brought by the Secretary of Labor under the provisions of the Labor-Management Reporting and Disclosure Act, Respondents would have been held to have been properly expelled under the Decision of this court upon which Petitioners relied in *NLRB* v. *Allis-Chalmers,* supra, and by the decision of this court in *Boilermakers* v. *Hardeman,* supra.

The lower court totally ignored the decisions of this court in said cases and established a state rule of law which took away from the employees inherent federal rights which were essential to the exercise of their power to bargain as the exclusive representative of employees for collective bargaining which rights were granted under Section 7 of the National Labor Relations Act as amended, and took away from the Petitioner those powers reserved to unions under the Proviso to Section 8(b)(1)(A) of said Act.

CONCLUSION

For the above stated reasons, particularly in view of the fact that there are contrary State Supreme Court cases such as *United Auto Workers* v. *Wisconsin Employment Relations Board,* supra, and since the matter involves vitally important federal questions, a writ should issue.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion and the journal entry of the District Court for the 29th Judicial District of Kansas are unreported but are found on pages 29 and 32 of the Appendix. The opinion of the Supreme Court of Kansas is also unreported but is found at page 1 of the Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether, under Kansas law, in the absence of provisions providing for expulsion or any other discipline, a Union may expel members for activity not proscribed in the Union Constitution and Bylaws.

STATEMENT OF THE CASE

The facts set out in the petition are essentially accurate. However, Respondents must add that not only do the Union's Constitution and Bylaws contain no provision authorizing expulsion or other disciplinary proceedings but, furthermore, contain no disciplinary rules of any kind other than those relating to nonpayment of dues. (A. 43)

Respondents' contention with respect to the effect of the collective bargaining agreement between the Union and the employer is also slightly misstated. That agreement contains a provision setting out the positive provisions for continued union membership and under what circumstances an employee may remain a Union member. It contains no provision attempting to keep the Union "from expelling strike breakers." (Petition 3) (A. 44)

ARGUMENT

Respondents contend that the Court should not grant the writ of certiorari in this case because (1) the decision of the Supreme Court of Kansas was correct, (2) the decision below creates no conflict with decisions of other state courts or courts of the federal system, and (3) the case involves no important issue of federal law which should be determined by the Supreme Court.

This case involves a determination of the rights of Respondents, Union members, with respect to their membership in Petitioner Union. The relationship between Union members and their Union is set out in the Constitution and Bylaws of the Union which, to the extent relevant, are set out in the Appendix. (A. 43) The relationship between a Union and its members is contractual in nature and that contract is embodied in the Constitution and Bylaws of the Union. *Machinists Lodge 405*, 185 NLRB No. 23, 75 LRRM 1004 (1970); *Local 248, etc.* v. *Wisconsin Employment Relations Board*, 11 Wis. 2d 277, 105 N.W.2d 271 (1960); *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 78 S. Ct. 923 (1958); *Radio Station KFH Co.* v. *Musicians' Association*, 169 Kan. 596, 220 P.2d 199 (1950).

The contract between the Union and its members in this case gives the Union no power to expel or otherwise discipline its members except in the case of nonpayment of dues which is provided for in the Constitution. (A. 44) The Kansas Supreme Court properly found that to sustain the Union position would require first the finding of some implied rule which Respondents had violated and then the finding of an implied power to punish for violation of this implied rule. (A. 12) As the Court said "The Constitution and Bylaws of the Union contain no prohibition against crossing a picket line and, more significant and determinative in this case, contain no authorization for the Union to expel members for any reason." (A. 12) Sound contract interpretation requires this result.

The Kansas Court found that the absence of any provision for disciplinary proceedings in the Union's Constitution was explained by other evidence. The contract between the company and the union negotiated by the

Union on behalf of its members set out an unusual provision containing requirements for membership in the Union: (1) the signing of an authorization card and (2) payment of dues. As long as a member fulfills these two requirements (and there is no contention that Respondents herein did otherwise) he may continue his membership at his discretion. (A. 44) The Court found that such language "rejects any implied authority of the Union to impose other requirements on membership." (A. 13) This language buttressed the Respondents' argument that no authority should be implied.

The petition inaccurately contends that the decision of the Kansas Supreme Court is in conflict with decision of this Court and other state supreme courts. The Courts are unanimous in the position that the relationship of a Union member to his Union is contractual in nature and that the contract is embodied in the Constitution and other rules of the Union, *Machinists Lodge 405, supra, Local 248, etc.* v. *Wisconsin Employment Relations Board, supra,* and, while this Court has not been called upon to specifically adopt such a position, it has recognized and approved it. *International Association of Machinists* v. *Gonzales, supra,* at 618-619.

Petitioner relies heavily upon this Court's decision in *International Brotherhood of Boilermakers, etc.* v. *Hardeman,* ..... U.S. ....., 91 S. Ct. 609 (1971) but in that case this Court specifically said that state law may, in many circumstances, go farther than federal law (..... U.S. ....., 91 S. Ct. at 616, footnote 11). This Court there pointed out that the Labor Management Reporting Disclosure Act (29 USC 413), specifically preserves state law remedies in this area (..... U.S. ....., 91 S. Ct. at 616). A statement of this Court in the *Gonzales* case is particularly applicable to the instant case:

> But the protection of Union members in their rights as members from arbitrary conduct by Unions and Union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. . . . The present controversy is precisely one that gives legal efficacy under *state law* to the rules prescribed by a labor organization for "retention of membership therein." Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of Union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important Union rights. (emphasis supplied) 356 U.S. at 620, 78 S. Ct. at 925.

Petitioner's reliance upon the *Hardeman* case is entirely misplaced. This situation is utterly unlike that case. There the expelled Union member was charged with violation of specific articles of the Union Constitution and the district court attempted to substitute its interpretation of what was contemplated by the Union Constitution for the Union's own interpretation. That, this Court said, it could not do. However, the instant situation is entirely different. In *Hardeman,* there were rules and regulations which were reasonably applied. Here, on the other hand, there are no rules and regulations and the Union, in order to sustain its course of conduct, must be found to have the power to create offenses out of whole cloth and then, out of similar cloth, create disciplinary proceedings to redress these offenses. Neither this Court nor any other court has even attributed such authority to a Union.

Unlike unfair labor practice assertions under Section 8 (b) of the National Labor Relations Act (29 USC 159), the subject matter of the instant proceeding is in no way preempted by federal law. There is no question that Unions have, under Section 8(b)(1) of that Act, the

power to prescribe rules and regulations for retention of Union membership. But the Union chose not to do so and that is crucial here. None of the rules agreed upon by the members of the Union prohibit crossing a picket line. Moreover, the members did not by their contract of self-organization give the Union authority to expel or take other disciplinary action. Such contractual authority cannot be implied.

Finally, it must be pointed out that there is no important federal issue presented in this case which would merit a hearing by this Court. The facts of the case are rare, if not unique. We do not have presented a question of whether a Union has the right, under Kansas or federal law, to enact rules giving the "power to fine or suspend members." (Petition 7). Clearly, under both Kansas and federal law, a Union may formulate reasonable rules and regulations regarding membership. Here we are concerned only with a case where the Union did not adopt such power and did not provide for its exercise. But the failure of a given labor organization to adopt disciplinary rules and the means of enforcing them in no way affects the power to do so which has been exercised lawfully by many other Unions. Petitioner's remedy lies not with this Court. If the members of the Union desire to have the powers described here, the Constitution and Bylaws can be so written. Petitioner would lead the Court to believe that the decision of the Kansas Supreme Court improperly restricts the internal functioning of a Union. This is simply not the case. The statutes and the decisions of various courts clearly point out what Unions can do and the decision of the Supreme Court of Kansas in no way interferes with those Union rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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